

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 438 of 1997
with
CIVIL APPLICATION NO. 8299 OF 1997.

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

JMS LABS

Versus

YUSUFALI EESMAIL HADVAID

Appearance:

MR RR SHAH for APPELLANT

MR PM THAKKAR FOR M/S THAKKAR ASSOC. for Respondent

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 01/09/97

ORAL JUDGEMENT

This appeal challenges the ex-parte ad-interim injunction dated August 19, 1997 granted by the learned Extra Assistant Judge, Gondal restraining the appellant-defendant from using the trade mark labels/artistic works of JMS and/or NEW JMS LAL LEP as per Annexure -B (colly) to the interim injunction application on pouch/packet, cartoon/box and pamphlet

having identical and deceptively similar art works, designs, get-up, lay-out, placement of features in identical colour scheme with the identical name LAL LEP or any other identical or deceptively similar trade mark labels/artistic works to the plaintiff's trade mark labels/artistic work of LAL LEP as per Annexure A (colly) to the interim injunction application and thereby passing off or enabling others to pass off their Ayurvedic preparation used for bone setting and also from infringing the copyrights and trade mark rights of the plaintiff in any manner.

2. Mr. Shah, learned counsel for the appellant-defendant submitted that the trial Court ought not to have granted ex parte injunction in view of the provisions of order under Order 39 rule 3 CPC. The reasons given by the trial Court for granting ex parte injunction are germane to the merits of the matter rather than to explain as to how delay would defeat the ends of justice. Reliance has also been placed on certain decisions of this Court viz.; P.Chidambaram Vs. Joint Civil Judge (J.D.) Narol, Ahmedabad & ors. AIR 1986 Gujarat 17; Indian Oil Corporation Ltd. Baroda Vs. M/s. Gandhi Travels and Tours, Baroda, 29(1) GLR 316; Jalaram Ceramics Ltd. Vs. Pedder & Pedder Tiles Ltd., Appeal from Order No. 236 of 1997 and Prestige AM-Polycontainers Ltd. & Ors. Vs. Mauser Merke GmbH, Schilgesstrabe and anr. Appeal from Order No. 29 of 1994. It is, therefore, submitted that the trial Court should not have passed such an ex parte order without first giving the defendant an opportunity of being heard or without recording reasons as to why it was necessary to grant an ex parte interim injunction without giving the defendant an opportunity of being heard.

3. Mr. P.M. Thakkar learned Counsel for the respondent-plaintiff has raised a preliminary objection to maintainability of the appeal. He stated that the trial Court had fixed the hearing of the interim injunction application on August 29, 1997. On the returnable date the defendant applied for adjournment before the trial Court for filing its written statement and, therefore, the plaintiff also submitted an application for extending the ad-interim injunction to which the learned Advocate for the defendant agreed that the ad interim injunction may be extended till the next date of hearing. Mr. Thakkar has, therefore, submitted that since the appellant-defendant had prayed for adjournment before the trial Court on the returnable date and also agreed to the extension of the ad interim relief, the present appeal from order is not competent.

4. Mr.R.R.Shah learned Counsel for the appellant-defendant submitted that nine days' time was not sufficient for filing written statement to the application for interim injunction and therefore, the appellant had no alternative but to request for time. Otherwise also the appellant was taking steps to challenge the said order before this Court and the stay application to be filed in this Court was already affirmed on August 21, 1997 but the order of the trial Court was not legible and therefore, he could not approach this Court earlier. He further submitted that once the plaintiff enjoys ex parte injunction, hearing of the interim injunction application generally may not take place for months together and the defendant would have to suffer, even if he has a good defence on merits.

5. Although it might appear at the first blush that the preliminary objection raised on behalf of the respondent-plaintiff and the objection raised on behalf of the appellant-defendant regarding violation of the provisions of Order 39 rule 3 CPC are at different planes and should be dealt with separately, in my view, they are two facets of the same problem.

One cannot lose sight of the hard realities that in such matters if the plaintiff gets an ex parte injunction the plaintiff is then not in a hurry to proceed with the matter and the ex parte order has a tendency to continue for an unreasonable long time but the converse is equally true that if the plaintiff does not get any ex parte injunction, the defendant has a tendency to prolong and delay the hearing of the interim injunction application and the plaintiff may suffer even if he has a good case on merits. This situation arises because apart from frequent breach of the provisions of Order 39 rule 3 of the CPC the provisions of Order 39 rule 3A which enjoin upon the trial Court to finally dispose of the interim injunction application within 30 days from the date on which the ex parte injunction was granted are observed more in breach than in compliance. Very often this Court is approached ostensibly for vacating the ex parte injunction but really to get a peremptory time table. Similarly the plight of a plaintiff who is unsuccessful in getting ex parte injunction also becomes unenviable when the hearing of the interim injunction application is delayed and ultimately even when he gets the interim injunction in his favour, the appellate Court while hearing the stay application looks at the position which prevailed during the pendency of the interim injunction application.

There is no reason why the requirement of hearing and deciding the interim injunction application within 30 days should apply only in cases where ex parte injunction is granted. The same time limit must be applied also to cases where ex parte injunction is not granted.

It is of course true that one of the parties also may not cooperate for early hearing of such applications. It would, therefore, be proper that the trial Court while issuing notice on the interim injunction application sets down the date-schedule for filing the reply/rejoinder and the date of hearing of the application with a clear stipulation that if the time limit specified in the Schedule is not adhered to adverse order may follow. For instance a period of two weeks may be granted to the defendant for filing his reply on merits. Another week's time may be given to the plaintiff for filing rejoinder and thereafter the date of hearing should be fixed around a week thereafter which would enable the trial Court to hear the application for interim injunction within a period of one month from the date of issuance of notice on the interim injunction application. Such a schedule must be fixed up not only in cases where the ex parte injunction is granted but also in cases where the notice is issued without any ex parte injunction.

6. It also goes without saying that the Court may have a number of matter on board and, therefore, it may be necessary for the Court to impose same time limit even in the matter of arguments and to deal with the situation with a firm hand. As Their Lordships of the Supreme Court have said in the case of Life Insurance Corporation of India Vs. Escorts Ltd., (AIR 1986 SC 1370),

"Perhaps the time is ripe for imposing a time limit on the length of submissions and pagelimit on the length of judgments. The time is certainly ripe for brief and modest arguments and concise and chaste- judgments."

What was "perhaps" in 1986 should now be "certainly" in 1997 and what was "certainly" in 1986 should now be "peremptorily" in 1997. In case the party or its counsel remains absent on the date of the hearing the Court may have to proceed even ex parte or heavy costs may have to be imposed.

7. While any discussion regarding the delay between the date of a biparte interim order and the date of effective hearing of the suit may apparently seem to be outside the scope of this appeal, it is worth noting that

the delay whether during operation of *ex parte* injunction or during the subsequent stage after *biparte* interim order, hurts only one party and benefits the other and, therefore, it would be worthwhile considering (except in open and shut cases) whether while granting *ex parte* injunction or confirming or vacating it, the Court should impose such terms and conditions on the parties as a part of the order granting or refusing injunction which would not only make it non-profitable to the successful party at the *ad interim*/interim stage to delay the proceedings but which may also prompt both the parties to come forward before the Court for early hearing of the interim injunction application or the suit, as the case may be.

8. In view of the above discussion, while granting *ex parte* injunction, the Civil Court shall -

- (i). record the reasons for its opinion that the object of granting the injunction would be defeated by waiting till the first returnable date;
- (ii). require the applicant, in express and clear terms, to comply with the requirements of clauses (a) and (b) to the proviso to Rule 3 of Order 39 CPC, since compliance with these provisions is vital to the date schedule being adhered to;
- (iii). fix the firm dates of filing reply to the interim injunction application, rejoinder thereto and a tentative date of hearing the application with a statement in the notice that non-compliance with the schedule may result into adverse order being passed against the defaulting party;
- (iv) state whether the Court has considered imposing any specific terms and conditions while granting the *ex parte* injunction;

Even where the Civil Court merely issues notice on the interim injunction application, it shall set down a date schedule in the notice putting the defendants to notice that failure to file reply as per the schedule may entail an *ad-interim* injunction order passed against them.

9. As far as the facts of the instant case are concerned, the appellant-defendant was served with the *ex parte* interim injunction on August 20, 1997, It is surprising that the appellant could draft and affirm stay application on August 21, 1997 for filing it in this

Court, but could not file reply to the interim injunction application on the returnable date i.e. August 29, 1997. Since that was not done entertaining the present appeal would only encourage defendants to approach this Court rather than to approach the trial Court with a reply and with a request to vacate the ex parte injunction. In such cases where the ex parte injunction would adversely affect the existing business of a defendant, the trial Court would normally not be justified in passing ex parte injunction orders in view of the provisions of Order 39 rule 3 CPC and the aforesaid decisions of this Court but in case an ex parte injunction is required to be granted in the extra ordinary circumstances of a given case, the trial Court must take up the matter for earliest hearing.

10. Mr.Shah states that the defendant will file reply to the interim injunction application on or before September 15, 1997 and Mr.Thakkar states that the plaintiff will file rejoinder thereto within ten days thereafter. In view of the aforesaid arrangement, it is directed that the trial Court shall take up the interim injunction application for hearing latest by September 30, 1997 and shall decide the same as early as possible, preferably within ten days thereafter.

11. Mr. Shah for the appellant-defendant still submits that the ex parte injunction should be stayed as the schedule is already fixed as above and the defendant has a good case on merits, but it would not be able to carry on its business in view of the ex parte injunction. He stated that his client's turnover from the sale of the commodity in question is Rs.40,000 per year.

In order to take care of the grievance made by Mr.Shah that the business of the defendant is adversely affected by the ex parte order, Mr.Thakkar states that the plaintiff would deposit a sum of Rs.40,000/- in the trial Court within a period of fifteen days from today.

12. Since the application for interim injunction is

to be disposed of within a period of one month , it will be open to both the parties to make submissions before the trial Court on the question as to how the amount of deposit should be dealt with. It is directed that while disposing of the interim injunction application, the trial Court shall provide as to how the aforesaid amount of Rs.40,000 is to be dealt with. If the trial Court comes to the conclusion that the ex parte injunction deserves to be vacated and passes such an order, the

trial Court shall also pass an order as to whether the said amount or part thereof should be given to the defendant or not. In case the interim injunction application is allowed, the trial Court shall also consider whether the plaintiff should be permitted to withdraw the said amount. If such permission is granted, the order shall not be implemented for a period of 15 days from the date of such order, in order to give some time to the defendant to approach the appellate Court.

13. It must be made clear that since the reasons given by the trial Court do not show how the ends of justice would be defeated by waiting for the grant of ad-interim injunction till the first returnable date in the normal course this Court would have stayed the operation of the ex-parte injunction, but the following three cumulative features of the case have dissuaded me from granting such stay:

- (i). the appeal is filed without filing a reply to the interim injunction application before the trial Court though the defendant had nine days' time to do so and without making a request before the trial Court to vacate the exparte injunction;
- (ii). the plaintiff has agreed to deposit an amount which is sufficient to cover the defendant's loss of turnover for one year;
- (iii). the schedule for filing reply/rejoinder/hearing is fixed for the first time today with a clear warning that any party which fails to comply with or cooperate with the schedule may have to face adverse consequences on that count.

14. It is clarified that though the observations in this judgment are primarily in the context of disputes under the intellectual property laws, the Civil Courts must also consider in their discretion why the discussion in this judgment should not profitably be made use of while hearing interim injunction applications in other civil cases as well.

15. The appeal is accordingly disposed of in terms of the directions contained in paras 10 and 12 hereinabove.

16. Since the appeal is disposed of, the Civil Application does not survive and is accordingly disposed of.

sharma